IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1981

ROBERT HURST and LESLIE MINUS,
Petitioners,

v.

TRIAD SHIPPING CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ABRAHAM E. FREEDMAN,
CHARLES SOVEL,
CHARLES F. LOVE,
FREEDMAN AND LORRY,
Lafayette Building, 8th Floor,
Philadelphia, PA 19106
Attorneys for Petitioners.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

TABLE OF CITATIONS.

TABLE OF CITATIONS (Continued).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .

ROBERT HURST and LESLIE MINUS,
Petitioners,

v.

TRIAD SHIPPING CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Robert Hurst and Leslie Minus, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered herein on April 25, 1977.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania directing the verdict in favor of defendant was orally stated from the bench, is not reported and is printed as Appendix B (A3). The order of the District Court granting the motion for directed verdict is not reported and is printed as Appendix C (A10). The opinion of the United States Court of Appeals for the Third Circuit is not yet officially reported and

is printed as Appendix D (A11). The judgment of the United States Court of Appeals is not officially reported and is printed as Appendix E (A42). The order of the United States Court of Appeals denying the petition for rehearing is printed as Appendix F (A44).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 25, 1977 (Appendix E (A42)). Petition for rehearing was denied on May 24, 1977 (Appendix F (A44)). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does the elimination of the warranty of seaworthiness by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act conflict with Article III, Section 2 of the United States Constitution, which prohibits Congress from adding to or deleting anything from the maritime law which would change its characteristic features?

2. Was the negligence cause of action under the maritime law also wiped out by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, although the Act itself does not so provide?

3. In applying shore-based law to a maritime cause of action, did the Trial Judge commit prejudicial error in taking the case from the jury, because the ship's chief officer, who had been present for hours at the hatch where the unloading operation was taking place, testified that he had not noticed the *admittedly* unsafe hook, clearly visible to him?

STATUTES INVOLVED.

The statutory provisions involved are the United States Constitution, Article III, Section 2, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 905(b) and 33 U. S. C. 933(i).

STATEMENT UNDER RULE 33(2)(b).

Since the proceeding draws into question the constitutionality of the Act of October 27, 1972, Pub. L. 92-576, § 18(a), 33 U. S. C. 905(b), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U. S. C. § 2403 may be applicable.

No court of the United States as defined by 28 U. S. C. § 451 has, pursuant to 28 U. S. C. § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE.

Petitioners, two longshoremen, were injured while engaged in an unloading operation on the S/S "Island Archon". The safety catch was missing from the hook attached to the unloading cable with the result that when the hook rubbed against the side of the hatch, the eyes slid off the hook, causing the load to fall into the ship's hold below, injuring petitioners. The hook with the safety catch missing was *admittedly* unsafe (96a).

The ship's chief officer was stationed at number 5 hatch, watching the operation from 1:00 p.m. to 3:30 p.m., when the accident occurred, with the dangerous hook and the missing safety catch directly in front of him and clearly visible (83a, 88a, 124a, 125a).

It was stipulated that the hook with the safety catch missing was unsafe (96a), and that it was the custom and practice for the ship's officers to stand watch over the loading and unloading operations (102a). In addition, it was testified that the ship's officers have the authority to stop the operation if it is endangering the crew or the longshoremen or the ship itself (66a).

The chief officer, testifying by deposition, stated that he did not notice the safety catch was missing until after the accident. The court found that since the chief officer so testified, the evidence was insufficient to send the case to the jury, despite the fact that the chief officer had been on watch at the very hatch where the accident took place from 1:00 p.m. to the time of the accident (94a).

The Court of Appeals affirmed, holding that this Court, in *Panama R. R. v. Johnson*, 264 U. S. 375, 68 L. ed 748 (1924), did not mean what it said in stating that nothing can be added to or taken out of the maritime law which would change the characteristic features of that law; that what the Court should have said was that solely

the *jurisdiction* could not be tampered with. This is, of course, completely contradicted by the *Johnson* opinion.

On the question of negligence, the Court below ruled that the maritime law as to negligence was inapplicable even though the statute did not so provide and shore-based principles must apply, even though there is nothing in the amendments to support this conclusion. The Court below held further that the non-delegable duty to provide a safe place to work under the maritime law was also wiped out, despite the fact that the statute does not even remotely support such a conclusion.

REASONS FOR GRANTING THE WRIT.

I. The Most Vital Characteristic of the Maritime Law Was Wiped Out by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. The Applicable Section of the 1972 Law Must, Therefore, Be Stricken Down as Unconstitutional.

The Supreme Court of the United States, in *Panama R. R. v. Johnson,* 264 U. S. 375, 68 L. ed 748 (1924), said that when the Constitution was being formulated, the maritime law was literally incorporated into it by Article III, Section 2; that Congress had the authority to alter or amend the maritime law, *provided,* however, that it could not add to or detract from that law anything that would change its characteristic features.

In that case, the shipowner attacked the Jones Act on the ground that it marked too great a change in the maritime law and was, therefore, unconstitutional. In tracing the purpose and scope of the constitutional provision as reflected in prior decisions, and in holding that Congress had wide discretion in altering, supplementing or qualifying the law, the Court said (U. S. at 385-86, L. ed at 752):

> "As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in colonial times and during the Confederation, and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicity investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States,—subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject, and permits of the exercise of a wide discretion. . . ."

But, continued the Court, there are limitations which must be recognized, as:

> ". . . One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them, or in-

cluding a thing falling clearly without . . ." (U. S. at 386; L. ed at 752) [1]

In applying the rule to test the constitutionality of the Jones Act, the Court concluded:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system." (U. S. at 388-89, L. ed at 753)

Essential to the decision in *Panama R. R. v. Johnson, supra,* was this Court's recognition that there existed a distinct body of maritime law which could not be legislatively modified by Congress. The court, in *Panama R. R. v. Johnson, supra,* sustained the constitutionality of the Jones Act because the remedy for negligence which it created was not inconsistent with or in derogation of the seaman's basic right under the maritime law to recover for unseaworthiness under *The Osceola,* 189 U. S. 158, 47 L. ed 760 (1903), and provided an election to seek the benefit of the old law, unmodified, or the old law as modified.

The 1972 amendments, however, seek to do precisely what this Court, in *Panama R. R. v. Johnson, supra,* said

1. The holding of the Court below that the language quoted in the text from *Panama R. R. v. Johnson, supra,* placed boundaries only on Congress' power to alter the scope of admiralty jurisdiction and did not limit Congress' power to modify substantive maritime law is refuted by the specific reference to "boundaries to the *maritime law.*"

could not be done; i.e., to revoke a basic and fundamental feature of the maritime law. The warranty of seaworthiness is one, if not the most important, principle of the maritime law. Initially recognized as part of the basic fabric of the maritime law in *The Osceola, supra,* it has been held to be applicable to all seamen, *Mahnich v. Southern S. S. Co.,* 321 U. S. 96, 88 L. ed. 561 (1944), and to longshoremen and other harbor workers who perform work formerly done by members of the ship's crew and whose work advances the ship's maritime venture, *International Stevedoring Co. v. Haverty,* 272 U. S. 50, 71 L. ed. 157 (1926); *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 90 L. ed. 1099 (1946); *Pope & Talbot, Inc. v. Hawn,* 346 U. S. 406, 98 L. ed. 143 (1954).

To destroy the warranty of seaworthiness, as the 1972 amendments seek to do, is to destroy the most characteristic feature of the maritime law in direct violation of Article III, Section 2 of the United States Constitution and this Court's decision in *Panama R. R. v. Johnson, supra.* Accordingly, certiorari should be granted, and the decision below should be reversed.

II. The Maritime Law of Negligence Was Left Intact by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. The Decision Below Is in Conflict With the Decision of the Fifth Circuit in *Slaughter v. Ronde,* 509 F. 2d 973 (1975).

While the statute, 33 U. S. C. 905(b), as amended on October 27, 1972, in *express* terms eliminated the warranty of seaworthiness, it did nothing to change the longshoreman's negligence cause of action, and, in that respect, left the maritime law intact. There is no lack of clarity nor is there any ambiguity in the language of the amendments. The cause of action for negligence was not changed.

Long before this Court's decision in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. ed 1099 (1946) and *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 98 L. ed 143 (1954), recognizing that the warranty of seaworthiness extended to longshoremen and other harbor workers, there was a great body of law, traceable back to the early days of the Republic, which recognized the negligence cause of action. Principles such as the non-delegable duty of the shipowner to provide a safe place to work have been recognized from the early times, *The Anaces*, 93 Fed. 240 (4th Cir. 1899), to the most recent, *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206, 10 L. Ed. 2d 297 (1963). As Mr. Justice White stated in *Gutierrez*, in reference to the longshoreman's *negligence* cause of action:

> ". . . Respondent allowed the cargo to be discharged in dangerous and defective bagging, from which beans were leaking before discharge of the cargo began. *It had an absolute and nondelegable duty of care toward petitioner not to create this risk to him, which it failed to meet.* When this lack of care culminated in petitioner's injury, respondent became legally liable to compensate him for the harm." (U. S. at 211-12, L. Ed. at 302) (Emphasis supplied.)

In this situation, if Congress wanted to touch the negligence cause of action, it seems irrefutable that it would have inserted *express* language in the statute to wipe out the negligence cause of action, just as it did the warranty of seaworthiness. The fact that Congress did not do so manifests its intention to leave the negligence cause of action intact.

Of course, the same Constitutional argument heretofore made with respect to the warranty of seaworthiness applies with equal force to negligence principles, such as

the nondelegable duty to provide a safe place to work. The shipowner's liability for the negligence of all aboard its vessel, whether in the shipowner's direct employ or not, is just as much a part of the basic fabric of the maritime law as is the warranty of seaworthiness, *The China v. Walsh*, 7 Wall. 53, 19 L. Ed. 67 (1868). Here, however, there is an added factor—the statute itself may not be interpreted as eliminating the maritime cause of action, in view of the clear language of the amendments. Congress knew that there was a great body of maritime negligence law and, if it intended to wipe it out, it would have expressly done so, as it did the warranty of seaworthiness.

The amendments themselves preclude any intention of eliminating the maritime negligence cause of action. Section (i) of 33 U. S. C. 933, after stating that the liability under the compensation act shall be the exclusive remedy between the employer (stevedore) and employee, further states:

> "Provided, *that this provision shall not affect the liability of a person other than an officer or employee of the employer.*" (Emphasis supplied)

Notwithstanding the clear wording of the statute, the maritime defense bar has attempted to find support for a contrary interpretation in the legislative history of the amendments. However, where the language of a statute is clear, resort should not be made to legislative history, *C. I. R. v. Ridgeway's Estate*, 291 F. 2d 257 (3d Cir. 1961); *In re Parkwood, Inc.*, 461 F. 2d 158 (D. C. Cir. 1971); *U. S. v. Oregon*, 366 U. S. 643, 6 L. Ed. 2d 575, 81 S. Ct. 1278 (1961); *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F. 2d 153 (D. C. Cir. 1942), and even in those instances where a statute is ambiguous, the legislative history, while of some weight, is neither enacted by Congress nor signed by the President, and, there-

fore, does not have the force of legislation. *In re Evans,* 452 F. 2d 1239 (D. C. Cir. 1971), cert. den., *U. S. v. Evans,* 408 U. S. 930, 33 L. Ed. 2d 342, 92 S. Ct. 2479 (1972). It is, therefore, clear that opinions set forth in committee reports must not be substituted for the language of the statute.

Further, statutes formulated to abrogate or alter the common law should be narrowly construed and should not be considered to effectuate broad changes where the intent to do so is not expressly stated *within the words of the Act. Bauers v. Heisel,* 361 F. 2d 581 (3d Cir. 1966); *Charney v. Thomas,* 372 F. 2d 97 (6th Cir. 1967).

> ". . . no statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Herd & Co. v. Krawill Machinery Corp.,* 359 U. S. 297, 304-05, 3 L. Ed. 2d 820, 825 (1959).
>
> "Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long established and familiar principles, except when a statutory purpose to the contrary is evident . . ." *Isbrandtsen Co. v. Johnson,* 343 U. S. 779, 783, 96 L. ed 1294, 1299 (1952).

The decision of the Court below is in direct conflict with the Fifth Circuit's decision in *Slaughter v. Ronde,* 509 F. 2d 973 (5th Cir. 1975), a post-1972 case. There, the Court approved the holding that the 1972 amendments did not alter the shipowner's duty under the maritime law to use reasonable care to forbid dangerous methods of discharging cargo:

> ". . . Under the maritime law as it existed before the effective date of the 1972 amendments, a shipowner could be found guilty of negligence where the officers see or have actual visual notice of, or ample time to observe, unsafe stevedoring operations since it does not represent a safe place to work. La Capria v. Compagnie Maritime Belge, 296 F. Supp. 980 (S. D. N. Y.); aff'd. as to such holding in 427 F. 2d 244 (2nd Cir.). *That basis for liability still exists since, as stated, Congress did not intend to 'derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.'"* (390 F. Supp. 637, 640 (S. D. Ga. 1974). (Emphasis supplied.)

Accordingly, since there is no statutory language in the 1972 amendments which indicates that Congress intended to replace the existing maritime negligence remedy, the Court below clearly was in error when it substituted restrictive shoreside law for the maritime law of negligence.

III. Where the Ship's Officer Knew or Had Reason to Know That the Hook Which Was Used in the Unloading Operation Was Unsafe Because the Safety Catch Was Missing, His Failure to Correct This Condition Constituted Negligence on the Ship's Part in Connection with the Injuries Resulting, and the Case Should Have Been Submitted to the Jury.

The record shows unrefuted evidence that the Chief Mate went on watch at 1:00 p.m., and stood there until the accident at 3:30 p.m. He had a clear view of the loading cable, and there was no obstruction between him and the unsafe hook (124a). In this case, it did not take any trained eye, which of course the Chief Mate is presumed to have, to see that the safety catch was missing from the hook which dangled only a few feet away. Despite his

statement that he did not know the safety catch was missing, the jury could have inferred from the evidence that he must or should have seen it. This in itself was sufficient to send the case to the jury, regardless of which law applied—shoreside or maritime.

Even under shoreside law, a possessor of land or chattels who permits such land or chattels to be used by a third person is under a duty, *if present*, to use reasonable care to prevent an improper or dangerous use of the property or chattels. See Restatement of Torts, 2d, § 318.[2] The Court below rejected this principle as being applicable to the maritime law, asserting that it was a form of non-delegable duty which could no longer be applicable under the maritime law. Totally ignored by the Court below was that liability is imposed under this principle only where possessor of the land or chattels *is present*, and that this requirement of presence refutes any contention that it is a form of "non-delegable" duty.

In the instant case, the shipowner, through its cargo mate, *was present* and the improper use of the open hook was clearly visible to him. Under these circumstances, the assertion that imposing liability would be equivalent to recognizing a form of non-delegable duty is not only bad maritime law, but bad shoreside law as well.

---

2. Restatement of Torts, 2d, § 318 provides:

"Duty of Possessor of Land or Chattels to Control Conduct of Licensees

"If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

(a) knows or has reason to know that he has the ability to control the third person, and

(b) knows or should know of the necessity and opportunity for exercising such control."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review and reverse the decision below.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
CHARLES SOVEL,
CHARLES F. LOVE,
FREEDMAN AND LORRY,
Attorneys for Petitioners.